LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 16 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 839

UNITED STATES OF AMERICA ex rel. JESSE PUGH,
Respondent,

vs.

FRANK J. PATE, Warden of the Illinois State Penitentiary.
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (346-2000),
Counsel for Petitioner.

JOHN J. O'TOOLE,
DONALD J. VEVERKA,
Assistant Attorneys General,
Of Counsel.

Printed by Authority of the State of Illinois — 365

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions presented	2
Constitutional and Statutory Provisions	2
Statement of the Case	3
Reasons for granting the Writ	6
I—THE DECISION RENDERED IS IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME ISSUE	6
II—THE DECISION RENDERED IS IN CONFLICT WITH AN EARLIER DECISION OF THE SAME CIRCUIT ON THE SAME ISSUE	7
III—THE DECISION RENDERED IS INCONSISTENT WITH ILLINOIS SUPREME COURT DECISIONS DEALING WITH ANALAGOUS SITUATIONS	8
IV—THE DECISION IS OF VAST IMPORTANCE TO ILLINOIS	10
V—THE DECISION RENDERED IS INCONSISTENT WITH McCRAY vs. STATE OF ILLINOIS [386 U. S. 300 (1967)] AND WITH RUGENDORF vs. UNITED STATES [376 U.S. 528 (1964)]	11
VI—THE DECISION RENDERED IS INCONSISTENT WITH FEDERAL COURT DECISIONS DEALING WITH ANALAGOUS SITUATIONS	12
Conclusion	13

Authorities Cited

Hirschfield v. United States, 54 F. 2d 62 (7th Cir. 1931) 7

McCray v. State of Illinois, 386 U.S. 300 (1967) 2, 11

Miller v. United States, 273 F. 2d 279 (5th Cir. 1959), cert den., 362 U.S. 928 (1960) 12

People v Pugh, 69 Ill. App. 2d 312 (1966) 4, 10

People v. William Smith, 40 Ill. 2d 501 (Sept. 1968) 8

Rugendorf v. United States, 376 U.S. 528 (1964) ..2, 11

United States v. Konigsberg, 336 F. 2d 844 (3rd Cir. 1964), cert den., 379 U.S. 933 (1964) 12

United States v. McKay, 2 F. 2d 257 (D. Nev. 1924) .. 6

United States v. Pate, 401 F. 2d 6 (1968) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

UNITED STATES OF AMERICA ex rel. JESSE PUGH,
Respondent,

vs.

FRANK J. PATE, Warden of the Illinois State Penitentiary.
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

Petitioner, Warden Frank J. Pate, defendant-appellee in the Court below, prays that a writ of *certiorari* issue to review the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW.

The majority opinion and the dissenting opinion of the United States Court of Appeals, Seventh Circuit, are reported at 401 F. 2d 6, 8, and are attached hereto as Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals, Seventh Circuit, were entered on July 1, 1968, with one judge dissenting. The Warden's petition for rehearing by the Court *in banc* was denied on September 19, 1968, with two judges voting to grant the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

1) Whether an informant—affiant's use of a fictitious name on a complaint for search warrant renders the search warrant void, even though state law permits the use of assumed names without resort to court proceedings?

2) Whether search warrants issued by state courts are void simply because they are not issued in accordance with the Federal Rules of Criminal Procedure?

3) Whether the decision rendered by the United States Court of Appeals, with one judge dissenting, is inconsistent with *McCray* v. *State of Illinois*, 386 U.S. 300 (1967), and with *Rugendorf* v. *United States*, 376 U.S. 528 (1964)?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution
Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fourteenth Amendment

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Illinois Revised Statutes ch. 38, § 108-3 (1967)

§ 108-3. **Grounds for Search Warrant.** Upon the written complaint of any person under oath or affirmation which states facts sufficient to show probable cause and which particularly describes the place or person, or both, to be searched and the things to be seized, any judge may issue a search warrant for the seizure of the following:

(a) Any instruments, articles or things which have been used in the commission of, or which may constitute evidence of, the offense in connection with which the warrant is issued.

STATEMENT OF THE CASE

On August 29, 1963, a search warrant was issued by a judicial tribunal upon a complaint in which the informer, who gave his name as Joe Williams, stated under oath that narcotic drugs were concealed by Jesse Pugh in a certain apartment on the third floor of a building at 1809 East 67th Street in Chicago. The informer stated that he had purchased two tin-foil packages of heroin from Jesse Pugh at that address on August 28th. The warrant was executed on August 30th. When the officers were admitted into the apartment, they identified themselves as police officers, showed the search warrant to Jesse Pugh, and began their search of the apartment. Eventually, an envelope containing heroin was discovered concealed in a hi-fi set within the apartment.

Jesse Pugh was charged with unlawful possession of narcotics, and the narcotics found in the search were admitted into evidence at the trial over his objection. Defendant Pugh was convicted of the charge and sentenced for a term of five to ten years in the Illinois State Penitentiary. He appealed the conviction to the Illinois Appellate Court, First District, which affirmed the conviction. [*People* v. *Pugh*, 69 Ill. App. 2d 312, 217 N.E. 2d 557 (February, 1966)]. Leave to appeal was denied by the Illinois Supreme Court in an unreported order. In March of 1967, the Illinois Supreme Court denied Pugh leave to file an original writ of *habeas corpus*.

Pugh then filed a petition for *habeas corpus* in the United States District Court for the Northern District of Illinois, Eastern Division, and he was given leave to proceed *in forma pauperis*. In his petition Pugh alleged that his constitutional rights under the Fourth, Fifth and Fourteenth Amendments were violated in that the narcotics introduced at his trial had been obtained by an illegal search and seizure. (Appendix p. 4) After briefs were filed the District Court denied the petition for writ of *habeas corpus*, and Pugh appealed.

On July 1, 1968, the United States Court of Appeals, Seventh Circuit, held that the informant-affiant's use of a fictitious name on the complaint did in fact *per se* void the search warrant. Judge Kiley, dissenting, said:

> "The Fourth Amendment requires a warrant to be supported by oath or affirmation but does not expressly require the person giving that oath to sign his correct name. No Supreme Court case is cited which supports Pugh's contention. The case of *King* v. *United States*, 282 F.2d 398, involved a federal search warrant to seize liquor, and the facts in that case do not war-

rant its use in supporting Pugh's contention. There a hearing on a motion to suppress disclosed that the affiant used a quality fictitious name to add reliability to the application, and that the issuing magistrate was deceived. Moreover, the actual affiant could not be located to testify at a hearing on the motion to suppress. But here the motion to suppress was on the ground that the fictitious name itself voided the warrant.

The Illinois Appellate Court rejected Pugh's *per se* contention in *People* v. *Pugh,* 217 N.E.2d 557; and in *People* v. *Mack,* 145 N.E.2d 609, at page 615 the Illinois Supreme Court stated that a fictitious name in the affidavit for a warrant is not ground for quashing a warrant. In my view the Illinois Appellate and Supreme Court decisions construing Illinois law with respect to the issuance of search warrants should not be circumvented by a decision of a federal court construing Rule 41(c) FED. R. CR. P., where the Illinois court decisions do not offend the requirements of the Fourth Amendment as included in the Fourteenth Amendment." (401 F. 2d at 8, 9)

Warden Pate filed a timely petition for rehearing by the Court *in banc,* and his petition was denied on September 19, 1968. Two judges voted to grant the petition.

At no time after his conviction has Pugh denied that the allegedly perjurious allegations were sufficient to show probable cause, and the main contention advanced has been that a fictitious signature *per se* voids a search warrant. At all stages of the proceedings, the State has conceded that the informant-affiant used a fictitious name.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION RENDERED IS IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME ISSUE.

In holding that the use of a fictitious signature on an affidavit for a search warrant voids the search warrant, the Court of Appeals took a position which is directly contrary to that taken by a Court of Appeals in Nevada. The decision referred to is *United States* v. *McKay,* 2 F. 2d 257 (D. Nev. 1924), where the Court also considered the validity of a search warrant. The affidavit for the search warrant in that case was signed "Frances Hall,'" and it was alleged that this was a fictitious name. In sustaining the validity of the search warrant which issued and which was executed, the Court in *McKay* said:

> "It is positively asserted by defendants that the name subscribed to the affidavit is fictitious, and the allegation that a sale of intoxicating liquor was made on the premises of James C. McKay and Florence McKay on the 2d day of December, 1923, was and is false. Under the common law a man can change his name at will, provided it is not done with a fraudulent purpose; he may sue and be sued by such adopted name, and will be bound by any contract into which he enters in his adopted name. This is true in the absence of a restrictive statute, and is not abrogated by the fact that a procedure is provided by statute for the change on one's name.
>
> Furthermore, when the affidavit was signed and sworn to before the commissioner, it became her duty to weigh the evidence to ascertain whether it

established probable cause for issuance of the warrant. This she did, and in so doing exercised a judicial function. The affidavit disclosed facts which, it true, were ample to support a search warrant.

Conceding that Frances Hall is an assumed name, that fact cannot justify an order quashing a search warrant otherwise regular on its face." (2 F.2d at 259) (Emphasis added)

The petitioner submits that *certiorari* should be granted to resolve this conflict.

II.

THE DECISION RENDERED IS IN CONFLICT WITH AN EARLIER DECISION OF THE SAME CIRCUIT ON THE SAME ISSUE.

In *Hirschfeld* v. *United States* [54 F. 2d 62 (7th Cir. 1931)], the facts showed that an affiant on a search warrant complaint was named "Theodore Roberts", yet he signed "Thodol" or "Thodor Robinson". It was contended that "the signature to the affidavit for issuance of the search warrant was fictitious . . ." (54 F. 2d at 63). In rejecting that argument, the Court of Appeals said:

> "*The fact that* [*the affiant*] misspelled his name, or even *wrote another name, will not affect the validity of the warrant* if in truth he signed and swore to it [citation omitted]; provided, of course, the magistrate had that reasonable ground which the law requires for the issuance of the warrant." (54 F. 2d at 63) (Emphasis added)

In reaching the decision now challenged, the Court of Appeals attempted to distinguish *Hirschfeld* on the ground that this earlier decision involved a "nickname" rather than a "fictitious" name. The petitioner submits that there is no difference between the two, and that such a semanti-

cal distinction leaves the state courts with no identifiable standard to use. In order to resolve this confusion created by two inconsistent decisions from the same Circuit, this Court should grant *certiorari.*

III.

THE DECISION RENDERED IS INCONSISTENT WITH ILLINOIS SUPREME COURT DECISIONS DEALING WITH ANALAGOUS SITUATIONS.

In *People* v. *William Smith*, 40 Ill. 2d 501 (Sept. 1968), the facts were that an informant appeared before a judge and swore out an affidavit upon which a search warrant issued. Apparently the name given by the informant (John Henderson) was not his true name. A search was conducted and narcotics found. Prior to the trial the defendant filed a motion to suppress the evidence and also demanded that the informant be produced for cross examination. Both motions were denied. On appeal the Illinois Supreme Court affirmed the conviction, holding that the prosecution was not obligated to produce the informant even though he was the affiant on the complaint for the search warrant.

A previous Illinois decision to the same effect is the one mentioned by Judge Kiley in his dissent, *People* v. *Mack* [12 Ill. 2d 151 (1957)]. The relevant facts in *Mack* were stated as follows:

> "On March 20, 1956, an informer, who signed the admittedly fictitious name of "John Jones," made a complaint for a search warrant in which he stated under oath his belief that heroin and other contraband narcotic substances were kept and concealed by some person unknown in the second floor apartment numbered 2F at 4633 Drexel Boulevard. As a basis for such belief the informer further stated: "I, John Jones,

> on the date aforesaid, saw in the aforesaid premises in the possession of some person unknown a quantity of narcotic drugs known as heroin from which said person sold and delivered to me one-half of an ounce of heroin for the sum of $80.00." Sims, who testified that the informer had come forward with his information voluntarily, accompanied him to the municipal court where two judges examined the complaint, questioned the complainant-informer and, on March 21, 1956, ordered a search warrant to issue as prayed." (12 Ill. 2d at 154, 155)

On a motion to suppress, the policeman refused to divulge the true identity of the informant. By denying Mack's motion to suppress, the trial court in effect upheld the refusal to disclose the informant's identity. On appeal the Illinois Supreme Court affirmed the conviction, saying:

> "Extensive research has brought to light no case in which the privilege has been upheld to conceal the identity of one signing an affidavit for a search warrant; however, we infer its application in such a case from numerous decisions which have dealt with the scope of the informer's privilege where the legality of a search *without* a warrant was in issue and the communications of an informer were claimed to establish probable cause."
>
> * * * *
>
> "As we construe the facts, the case falls within the principle of *United States* v. *Scher,* 305 U.S. 251, 83 L. Ed. 151, wherein it was held the identity of an informer, whose information provoked police investigation and the arrest and search of the accused's car without a warrant, could remain undisclosed when the police subsequently saw and heard for themselves sufficient to justify conviction. The circumstances of the present case that the informer conveyed his information to the police through the medium of a search

> warrant does not, as we view it, afford a reason to depart from the principle of the *Scher case*. We conclude that the informer's privilege was fairly and properly exercised in this case and that its exercise does not imply, as defendant suggests, that the informer's testimony would have been unfavorable to the prosecution." [12 Ill. 2d at 164, 165, 166, 167]

Since the decision rendered is in conflict with these Illinois decisions, and since there are now two conflicting decisions from the Seventh Circuit, *certiorari* should be granted so that the uncertainty will be resolved.

IV.

THE DECISION IS OF VAST IMPORTANCE TO ILLINOIS.

In *People* v. *Pugh*, 69 Ill. App. 2d 312 (1966), the Illinois Appellate Court rejected the contention which was accepted by the Court of Appeals. The decision of the Illinois Appellate Court was firmly predicated on established Illinois law, which has been only this last term again reiterated by the Illinois Supreme Court.

There are presently pending in the Illinois trial courts numerous cases (estimated to be in the hundreds) which also involve search warrants obtained by having the informants swear out affidavits under assumed names. If the challenged decision is allowed to stand, the administration of criminal justice in Illinois will be greatly impaired. Therefore this Court should take the opportunity to decide if a rule having such an effect is warranted under the facts in this case.

V.

THE DECISION RENDERED IS INCONSISTENT WITH McCRAY vs. STATE OF ILLINOIS [386 U.S. 300 (1967)] AND WITH RUGENDORF vs. UNITED STATES [376 U. S. 528 (1964)].

It is not infrequent that a policeman receives information from an informant, especially when the policeman is assigned to a narcotics detail. When an officer receives such information, he can proceed in one of three ways. He can go out and make a warrantless arrest on the basis of the information, as was done in *McCray* v. *State of Illinois* [386 U.S. 300 (1967)]. This means that no judicial officer has occasion prior to the arrest to determine if probable cause exists.

On the other hand, the policeman may go to a judge and swear out an affidavit based on the hearsay information which he has received from the informant. This is what was done in *Rugendorf* v. *United States* [376 U.S. 528 (1964)]. The criticism of this practice is that the officer may misrepresent the informant's reliability or the information given [See dissent in *McCray,* 386 U.S. at 316 (fn 2)]. Despite the possibilities of abuse in these two practices, however, this Court held that both practices are constitutional.

The third possible way of proceeding was followed in this case, and this is the only one of the three situations where a judge has an opportunity, prior to the arrest and search, to weigh the informer's credibility and test his knowledge.

Now, however, the Court of Appeals holds that when the informer swears to such information in an affidavit before

the judge, the search warrant which issues is void *per se* simply because the informer uses an assumed name to protect his identity. In so holding, the Court of Appeals strikes down a practice which affords more protection to an accused than those practices held constitutional in *Rugendorf* and *McCray*. *Certiorari* should therefore be granted to clarify this paradox.

VI.

THE DECISION RENDERED IS INCONSISTENT WITH FEDERAL COURT DECISIONS DEALING WITH ANALAGOUS SITUATIONS.

Even prior to the time that *McCray* was decided by this Court, the lower federal courts had held that the government did not have to disclose the identity of informants even though it was the informer's information that led to the arrests. [*United States* v. *Konigsberg*, 336 F. 2d 844 (3rd Cir. 1964), *cert. den.*, 379 U.S. 933 (1964); *Miller* v. *United States*, 273 F. 2d 279 (5th Cir. 1959), *cert. den.*, 362 U.S. 928 (1960)]. As was argued in the preceding Point, it seems totally inconsistent with those cases to hold that if the informant swears out an affidavit under an assumed name, rather than remaining completely anonymous, the search warrant is void *per se*.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (346-2000),
Counsel for Petitioner.

JOHN J. O'TOOLE,
DONALD J. VEVERKA,
Assistant Attorneys General,
Of Counsel.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16539 SEPTEMBER TERM, 1967 APRIL SESSION 1968

United States of America, *ex rel.* Jesse Pugh, Petitioner-Appellant, vs. Frank J. Pate, Warden of the Illinois State Penitentiary, Respondent-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 1, 1968

Before SCHNACKENBERG, KILEY and FAIRCHILD, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Jesse Pugh, petitioner, has appealed from an order of the district court denying his petition for a writ of habeas corpus, filed May 11, 1967, naming as respondent, Frank J. Pate, Warden of the Illinois State Penitentiary.

It appears from petitioner's brief that on September 14, 1964, he was sentenced to the penitentiary for not less than

five nor more than ten years, and that on his appeal, his conviction was affirmed by the Illinois Appellate Court, First District, 69 Ill. App. 2d[1] 312, 217 N.E. 2d 557 (1966). On March 17, 1967, petitioner was denied leave to file an original writ of habeas corpus by the Illinois Supreme Court.

The only error relied upon for reversal is:

> The trial court, the Appellate Court of Illinois, and the United States District Court erred in holding that a fictitious signature, signed to the affidavit for a search warrant, did not render the search warrant void.

Petitioner accepts the facts as stated in the opinion of the Illinois Appellate Court, at 313, which, in pertinent part is as follows:

> "On August 29, 1963, a search warrant was issued by a judicial tribunal upon a complaint in which the informer, who gave his name as Joe Williams, stated under oath that narcotic drugs were concealed by Jessie Pugh in a certain apartment on the third floor of a building at 1809 East 67th Street in Chicago. The informer stated that he had purchased two tinfoil packages of heroin from Jessie Pugh at that address on August 28th. The warrant was executed on August 30th. When the officers were admitted into the partment, they identified themselves as police officers, showed the search warrant to Jessie Pugh, and began their search of the apartment. * * * Eventually, an envelope containing heroin was discovered concealed in a hi-fi set within the apartment. All of the narcotics was admitted into evidence at the trial, over the objection of the defendants."

In this court, it is alleged in the brief of petitioner and not denied that the affiant, who signed the complaint for

---

1. Leave to appeal was denied by the Supreme Court of Illinois on May 16, 1966.

the search warrant as "Joe Williams", thereby used a fictitious name and signature.

In *King* v. *United States,* 4 Cir., 282 F. 2d 398 (1960), it was said at 399:

> "* * * The constitutional requirement of an oath or affirmation would be effectively eroded away if fictitious oaths were permitted. The statutory mandate that the affiant's name *shall* be stated is not satisfied by a false name, given by an unknown individual. * * *"

In that case, conviction of defendant King rested on evidence taken from his home under a search warrant and the sole point of appeal was that the underlying affidavit was invalid and hence the search warrant was likewise invalid. This contention the court upheld. The affidavit was executed by Ruth or Rutha Douglas before a United States commissioner, upon which the commissioner authorized a search of King's home. The court said, at 399:

> "* * * The short of it is that an oath by a person claiming a spurious identity is the sole basis for the warrant and the search. * * *"

At 399, the court added:

> "The Fourth Amendment to the Constitution of the United States explicitly requires that 'no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation* * * *.' (Emphasis supplied.) Rule 41 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., requires that the warrant 'shall state the grounds or probable cause for its issuance and the *names of the persons whose affidavits have been taken in support thereof.*' (Emphasis supplied.)
>
> * * *
>
> "* * * It has been repeated many times that the requirements for issuance of a search warrant must be strictly adhered to and that the Fourth Amendment 'guaranties are to be liberally construed to pre-

vent impairment of the protection extended.' *Grau* v. *United States,* 1932, 287 U.S. 124, 128, 53 S.Ct. 38, 40, 77 L.Ed. 212. Judge Soper, speaking for this court, recently stated:

> 'It has been laid down again and again that the prohibition of the Fourth Amendment against unreasonable searches and seizures must be rigidly enforced and that the procedure for the issuance of a search warrant which gives effect to the amendment must be scrupulously observed.' *Baysden* v. *United States,* 4 Cir., 1959, 271 F. 2d 325, 327.'

To uphold the warrant in the instant case would be completely inconsistent with the above admonition."

The court in *King* pointed out that the demand of rule 41 for the affiant's name is not without purpose and that it has been said that someone must take the responsibility for the facts alleged, giving rise to the probable cause for the issuance of a warrant, and that defendant should be apprised of the name of that person. The court added, at 400:

> "* * * When the affiant is cloaked in secrecy there is no one who can be held responsible.
>
> "Another reason for naming the affiant is to enable an aggrieved person to probe and challenge the legality of the warrant. Section 41 (e) of the rule makes this plain. Giving a name other than the affiant's is not compliance. It is established law that the warrant would be fatally defective if no name were mentioned. *United States* v. *Kaplan,* D.C. S.D. Ga. 1923, 286 F. 963; *Howard* v. *State, supra.* It would be an anomaly if it could be said that the rule has been obeyed when, instead of omitting the affiant's name altogether, another person's name is deceptively substituted. If it should be held that the use of a mere sham has the effect of validating the warrant, then the aggrieved party would be frustrated in his effort

> to discover who the affiant is and to test the legality of the search, as authorized by the rule. The rule's remedial procedure would be vitiated."

The court also pointed out, at 400, that the case before it was not an instance of affiant using a nickname by which he is sometimes known, rather than his real name.[2] While the state prosecution now before us is not subject to the federal rules of procedure, we think that the fourth amendment itself, in requiring an oath or affirmation, precludes hiding the identity of affiant or affirmant by use of a false name.

Without further citation of authorities, we are convinced that the order from which this appeal was taken must be, and it is hereby, reversed and this cause is remanded to the district court with directions to issue a writ of habeas corpus as prayed by petitioner.

REVERSED and REMANDED
WITH INSTRUCTIONS

No. 16539

KILEY, *Circuit Judge*, dissenting.

I dissent. Pugh contends that the use of the fictitious name on the affidavit for the warrant *per se* voids the warrant under the Fourth Amendment. I cannot agree with this contention because I find nothing in the Constitution which requires such a result absent a showing of some prejudice to petitioner. Here petitioner does not claim that the issuing magistrate was not aware that the affiant was using a false name or that the affiant's true identity was unknown to the magistrate. Petitioner does not claim that he sought the identity of the affiant from police and was unable to get it or even that he did not

---

2. Such as in *Hirschfeld* v. *United States*, 7 Cir., 54 F. 2d 62 (1932).

know the real identity of the affiant. I agree that the affiant must be named where the defendant wishes to question the existence of probable cause by a motion to suppress, but petitioner here has not, so far as the record before us shows, ever questioned the existence of probable cause.

The Fourth Amendment requires a warrant to be supported by oath or affirmation but does not expressly require the person giving that oath to sign his correct name. No Supreme Court case is cited which supports Pugh's contention. The case of *King* v. *United States,* 282 F. 2d 398, involved a federal search warrant to seize liquor, and the facts in that case do not warrant its use in supporting Pugh's contention. There a hearing on a motion to suppress disclosed that the affiant used a quality fictitious name to add reliability to the application, and that the issuing magistrate was deceived. Moreover, the actual affiant could not be located to testify at a hearing on the motion to suppress. But here the motion to suppress was on the ground that the fictitious name itself voided the warrant.

The Illinois Appellate Court rejected Pugh's *per se* contention in *People* v. *Pugh,* 217 N.E. 2d 557; and in *People* v. *Mack,* 145 N.E. 2d 609, at page 615 the Illinois Supreme Court stated that a fictitious name in the affidavit for a warrant is not ground for quashing a warrant. In my view the Illinois Appellate and Supreme Court decisions construing Illinois law with respect to the issuance of search warrants should not be circumvented by a decision of a federal court construing Rule 41(c) FED. R. CR. P., where the Illinois court decisions do not offend the requirements of the Fourth Amendment as included in the Fourteenth Amendment.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.